No. 86-1061

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE TRIBUNE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly sealed a bill of particulars that disclosed the names of unindicted co-conspirators.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A10-A27) is reported at 799 F.2d 1438.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1986. A petition for rehearing was denied on October 27, 1986. The petition for a writ of certiorari was filed on December 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 23, 1985, a grand jury in the United States District Court for the Middle District of Florida returned a 45-count indictment in *United States* v. *Fred A. Anderson,* No. 85-59-Cr-T-13, against 30 defendants. The indictment charged that the Board of County Commissioners for Hillsborough County, Florida, constituted an "enterprise" within the meaning of the Racketeer Influenced and Cor-

rupt Organizations Act, 18 U.S.C. 1961-1968. It also charged that the defendants, including three county commissioners and various construction contractors, real estate suppliers, lawyers, and others conspired to and did violate 18 U.S.C. 1962(c) by conducting the business of the Board of County Commissioners through a pattern of bribery. Pet. App. A11.

In describing the bribery scheme, the indictment referred to several known and unknown participants in the charged offenses who were neither indicted nor named (Pet. App. A12). After the return of the indictment, several of the named defendants filed motions for bills of particulars to obtain the names of the known but unnamed co-conspirators. On August 23, 1985, a magistrate granted the motions. *Ibid.*

The government responded by filing the requested bill of particulars along with an in camera, ex parte motion to seal the document. The district court granted the motion.[1] The court noted that "naming the unindicted co-conspirators stigmatizes them" and "may severely harm their reputations and deny them employment or other economic opportunities." C.A. Record Excerpts Tab 6, at 1. At the same time, the court explained that such individuals, unlike persons who are indicted, are not protected by a grand jury from unsupported accusations, have no opportunity to confront their accusers or argue their innocence at trial, and cannot be vindicated by acquittal. In light of these considerations, the court concluded that sealing the bill of particulars would be appropriate "[t]o avoid the stigma" that would follow from "publicly brand[ing]" the unindicted co-conspirators as

[1] The court also sealed the government's motion and the order granting the motion, and it did not note the entry of its order on the docket sheet (Pet. App. A12-A13). The court subsequently unsealed its order, but declined to unseal the motion because it "reveal[ed] in part the sealed information" (*id.* at A3).

"criminal[s] without the opportunity for vindication." *Id.* at 2. The court accordingly ordered defense counsel not to disclose the names of the unindicted co-conspirators to the press or the public pending further court order (*id.* at 3).

Petitioner, the publisher of The Tampa Tribune, then filed a petition for access, seeking release of the bill of particulars. The district court denied the petition, restating its earlier conclusions (Pet. App. A5-A9). Citing *United States* v. *Briggs,* 514 F.2d 794 (5th Cir. 1975), the court explained that petitioner's request should be judged under "a balancing test, weighing the harm to the individual against the government's interest." Here, the court found that "the harm to the individuals named as unindicted co-conspirators is great. Though branded as criminals, they will not be afforded an opportunity to clear their names even though the allegations may be baseless." This harm, the court concluded, "outweighs the public's interest in learning this information before the trial." Pet. App. A7-A8. The court added that much of the requested information likely would be revealed at trial (*id.* at A8).

2. The court of appeals affirmed the district court's denial of the petition for access, although on different grounds (Pet. App. A10-A27). The court reasoned that a "true bill of particulars" serves to "supplement[] an indictment by providing the defendant with information *necessary* for trial preparation. Generalized discovery, however, is not an appropriate function of a bill of particulars" (*id.* at A22-A23 (emphasis in original)). The court accordingly declined "to apply a mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment" (*id.* at A24 (footnote omitted)). In this case, the court concluded, the defendants' attempt to obtain the names of unindicted co-conspirators was, in essence, a "discovery request" (*ibid.*).

Having determined that the bill of particulars in this case served largely as a discovery device, the court held

that "a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view" (Pet. App. A24 (footnote omitted)). Citing this Court's decision in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), the court of appeals explained that "[d]iscovery is neither a public process nor typically a matter of public record" (Pet. App. A19). Thus, by denying the petition for access, the district court "merely refused to allow the Tribune access to a document not a matter of public record" (*id.* at A21). Such a document, the court concluded, "cannot be made a matter of public record by simply attaching to it the label 'bill of particulars' " (*id.* at A24).[2]

ARGUMENT

Petitioner contends that the decision below is in conflict with rulings of this Court recognizing First Amendment and common law rights of access to certain criminal proceedings and court documents. Petitioner's contention, however, disregards the narrow and essentially factual nature of the court of appeals' actual holding.

1. As petitioner notes, this Court has held that the press has a qualified First Amendment right of access to

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[2] Some of the defendants also filed motions for pretrial notice of the government's intention to use "similar acts" evidence under Fed. R. Evid. 404(b). While the district court granted the motions, it sealed the material produced by the government (C.A. Record Excerpts Tab 7, at 1-2). The district court subsequently declined to unseal the material, explaining that "[l]ike the list of unindicted co-conspirators, the notice of similar act evidence names individuals who allegedly participated in bribery but who were not named in the indictment" (Pet. App. A8). The court of appeals affirmed this decision, holding that the notice of similar act evidence was a discovery document that was not a matter of public record (*id.* at A21-A22). Petitioner has not challenged this aspect of the ruling below.

criminal proceedings when two conditions are met: when the proceeding involved "has historically been open to the press and general public," and when "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.* v. *Superior Court,* No. 84-1560 (June 30, 1986) (*Press-Enterprise II*), slip op. 6. Applying this principle, the Court has found such a right of access to pretrial hearings (see *ibid.*), to the voir dire (see *Press-Enterprise Co.* v. *Superior Court,* 464 U.S. 501, 505 (1984) (*Press-Enterprise I*)), to trial (see *Globe Newspaper Co.* v. *Superior Court,* 457 U.S. 596 (1982)), and to transcripts of those proceedings. Similarly, the Court has held that the public has a qualified common law right to inspect and copy judicial records. *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 597 (1978). See *United States* v. *Beckham,* 789 F.2d 401, 409-410 (6th Cir. 1986); *United States* v. *Rosenthal,* 763 F.2d 1291, 1294-1295 (11th Cir. 1985).

Petitioner contends that the decision below disregarded both of those rights (Pet. 8-9, 18-19). In fact, however, the court of appeals applied the principles set out in this Court's decisions, basing its holding on a conclusion that the bill of particulars in this case simply is not a court record of the sort that traditionally has been available for inspection by the public. In contrast to bills of particulars that supplement an indictment by providing information that is essential for trial preparation—and that *are* public documents (see Pet. App. A27 n.5)—the court found that the bill here "merely facilitate[d] voluntary discovery" (*id.* at A24). Such a document, the court correctly concluded, never has been held available to the public or the press.

As this Court explained in *Seattle Times Co.* v. *Rhinehart,* 467 U.S. 20, 32 (1984), even a litigant "has no First Amendment right of access to information made available for purposes of trying his suit." See *id.* at 33.

While *Seattle Times* involved civil proceedings, criminal discovery is, in general, no less private. Even petitioner does not suggest that there is a First Amendment or common law right of access to criminal discovery materials. The court of appeals' finding that the defendants' motion for a bill of particulars amounted to "a discovery request" (Pet. App. A24) accordingly disposes of this case.

2. Petitioner contends (Pet. 15-16) that the court of appeals' treatment of the bill of particulars here cannot be reconciled with *United States* v. *Smith,* 776 F.2d 1104 (3d Cir. 1985). In *Smith,* the Third Circuit, like the court below, addressed a request to unseal a bill of particulars that listed the names of unindicted co-conspirators. In that decision, the Third Circuit concluded that First Amendment and common law rights of access generally attach to bills of particulars because such bills are "more properly regarded as supplements to the indictment than as the equivalent of civil discovery." 776 F.2d at 1111.

The analysis used below and that applied in *Smith* are not squarely in conflict, however. The court below, like the Third Circuit in *Smith,* concluded both that indictments are public records (see Pet. App. A27 n.5; 776 F.2d at 1111-1112) and that true bills of particulars "supplement[] an indictment" (Pet. App. A22; see 776 F.2d at 1111). But the court below went a step further, "declin[ing] to apply a mechanical rule whereby a bill of particulars is *automatically* accorded the status of a supplement to an indictment" (Pet. App. A24 (emphasis added; footnote omitted)). Instead, the court held that "a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view" (*ibid.* (footnote omitted)). The Third Circuit has not yet specifically addressed the question whether this small subset of bills of particulars should be treated as

public records; until it does, consideration of the issue by this Court would be premature.[3]

In any event, whatever the tension between the analysis used below and the discussion in *Smith*, it is plain that petitioner's request for access would fail even in the Third Circuit. While the *Smith* court found that First Amendment and common law rights of access to the bill of particulars at issue there could be *asserted*, the Third Circuit in fact declined to unseal the bill because it concluded—under both the First Amendment and common law tests—that privacy interests outweighed the public interest in disclosure. On the basis of district court findings that are virtually identical to those in this case (compare 776 F.2d at 1106-1107, with C.A. Record Excerpts Tab 6, at 1-3 and Pet. App. A5-A9), the Third Circuit had "no hesitancy in holding" that the risk of reputational injury to the unindicted co-conspirators justified nondisclosure of the bill (776 F.2d at 1114). Indeed, the concurring judge in *Smith* characterized the Third Circuit's opinion as suggesting "that whenever an unindicted co-conspirator is threatened with serious injury to reputation or career, the sealing of the offending bill of particulars is warranted" (*id.* at 1115 (Mansmann, J., concurring)). Because petitioner accordingly would not be entitled to access to the bill of particulars in this case under any theory, further review is not warranted.

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[3] Despite petitioner's contentions to the contrary (Pet. 11 & n.3), the court of appeals did not specifically disapprove the district court's decision to grant the motion for a bill of particulars. While the court of appeals stated that "[g]eneralized discovery * * * is not an appropriate function of a bill of particulars" (Pet. App. A22-A23), it recognized that "a bill of particulars may be 'a proper procedure for discovering the names of unindicted coconspirators' " (*id.* at A26 n.5 (quoting *United States* v. *Barrentine*, 591 F.2d 1069, 1077 (5th Cir.), cert. denied, 444 U.S. 990 (1979)). The court's holding was simply that "such a 'discovery bill' is not entitled to the status of a public document, as is, for example, an indictment" (Pet. App. A27 n.5).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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